use *or* vend. It is in nowise necessary that an infringer do all of the forbidden acts, the doing of any one of them is sufficient, and it does not follow that patentable invention must be capable of enjoyment or infringement in all three ways. Its susceptibility to "use" would surely be sufficient. There is nothing therefore in the wording of the statute to preclude the patenting of such a process for accomplishing a desired result.

No more is there any reason in law, as established extraneous to the patent decisions, why the inventor should not have an exclusive right to the use of such an invention, except the bald fact that the Common Law did not recognize a right in *rem* to *any* invention. It did recognize other intangible *res,* however, so that there was no legal impossibility in an intangible ambit for a property right. As respects inventions particularly, the Common Law was changed by the statute. The logic of the change undoubtedly extends it to all inventions, whether they utilize tangible instrumentalities or not.

It is true that the exclusive right to such an invention might be extremely difficult to enforce, but the mere practical unsatisfactoriness of the remedy has never derogated the completeness of the right. Furthermore, it is not inconceivable that the exclusive right to use such an invention might have a very practicable value. If the means, the mental process, were one which could be used on the stage, for instance, to mystify audiences of those who were unacquainted with its details, the right to its use for such purposes might well be of considerable monetary value. Whether it *is* the law that such a concept is patentable, only the Supreme Court can say. Till that tribunal has spoken, it is, like the presence or absence of the inventive quality, a matter of opinion. But it may be said of this, as a certain lecturer used to say of invention, "if there is no reason why it is not, it probably is."

J. B. W.

STATUTORY LIABILITY OF SHAREHOLDERS ON TORT LIABILITIES AGAINST THE CORPORATION.—In the recent case of *Lininger* v. *Botsford,* 163 Pac. 63, it was necessary for the California Court of Appeals to pass upon whether the term "liability" as used in Art. 12, §3 of the California Constitution, and §322 of the Civil Code, imposing upon shareholders of corporations their proportional share of the "liabilities" of their corporation, over and above the unpaid part of their shares, extended to torts of the corporation. The court held that while the weight of authority was that that tort liabilities were not included within the scope of such provisions it had been held in California that the term "liability" included claims ex delicto, and therefore the shareholders must be held liable in this case. The case cited as to the construction of "liability," *Miller & Lux* v. *Kern County Land Co.,* 134 Cal. 586, sustains the court in its finding. But the court goes further and cites *Kelly* v. *Clark,* 21 Mont. 291, and *Buttner* v. *Adams,* 236 Fed. 105, to further support the decision. The former of these cases involved *common law* not *statutory* liability; the latter involved only the question of whether the liability was primary or secondary, and the matter of ultimate liability was not raised. The case serves to emphasize that the confusion and lack of discrimination which characterize the discussion of this question in all the

texts and most of the judicial opinions have been by no means dispelled even at this late date.

The first element of the confusion is that statutory liability is confused, on the one hand, with common law liability, where there is no question that the shareholder is liable for claims ex delicto of the corporation; and on the other hand, with penal liability for failure to perform some statutory corporate duty, where it is equally clear that no liability exists, unless by the express terms of the statute. The text writers are always clear enough on these two distinctions in their texts but entirely lose sight of them when they start to cite cases. In many of the judicial opinions the courts seem blissfully unconscious of any distinction whatsoever.

Another and still more effective element of confusion lies in the fact that the whole matter is one of statutory construction, that different theories of construction are employed, that the precise words of the particular statute are always of the utmost importance, and that cases construing radically different statutes are indiscriminately cited to support the construction announced of the statute under consideration. These elements, together with others hardly less important, such as whether the liability is secondary or primary, and whether it is contractual or statutory in nature, acting and reacting on one another, have resulted in a muddle fearful to contemplate.

In the first place it must be remembered that the liability imposed is purely statutory in nature. It had no existence at common law. Indeed at common law exemption from such liability was one of the most noteworthy characteristics of corporations. *Warner & Ray* v. *Beers,* 23 Wend. (N. Y.) 103; *Terry* v. *Little,* 101 U. S. 216; note in 43 Am. St. Rep. 834. Therefore though the statutes are "remedial" they are also "in derogation of the common law," which we take to mean that such statutes deprive shareholders of rights and immunities conferred upon them under the common law. And it must be again emphasized that since the liability is statutory the precise language of the statutes is always of the utmost importance. *Terry* v. *Little,* supra.

There are three theories of construction applied in the cases: (1) Liberal —The theory is that the statute is remedial and as such should be liberally construed to correct all the evils which the legislature intended to remedy. This theory is specifically applied in but four cases, viz. *Carver* v. *Braintree Mfg. Co.,* 5 Fed. Cas. No. 2485; *Rider* v. *Fritchie,* 49 Oh. St. 285; *Flenniken* v. *Marshall,* 43 S. C. 80; and *Henley* v. *Meyers,* 76 Kans. 723, 737. All these cases hark back to *Carver* v. *Braintree Mfg. Co.,* in which the opinion is given by Mr. Justice STORY. But that opinion proceeds entirely on the remedial nature of the statute, without considering the common law rights of the shareholders, and the case is expressly condemned in *Child* v. *Boston & Fairhaven Iron Wks.,* 137 Mass. 516, where FIELD, J., construing the same statute considered by STORY, J., says that "the decision of Mr. Justice STORY stands unsupported by any direct authority, either before or since"; in *Rogers* v. *Stag Mining Co.,* 171 S. W. 678, which refers to the decision as based on "strained construction"; in *Jones* v. *Rankin,* 19 N. Mex. 56, where the decision of STORY, J., is said to be against "the almost universal current

of authority in the United States, including the United States Supreme Court."

(2) Strict—The theory is that, because the statutes are "in derogation of the common law," depriving shareholders of immunities long enjoyed under the common law, the scope of the statute should not be extended beyond the natural meaning of the words actually employed. The weight of authority seems clearly with this view. Some of the cases are: *Jones* v. *Rankin,* supra; *Sherman* v. *Heacock,* 14 Wend. (N. Y.) 58; *Gray* v. *Coffin,* 9 Cush. (Mass.) 192; *Child* v. *Boston & Fairhaven Iron Wks.,* supra; *Rogers* v. *Stag Mining Co.,* supra.

(3) Reasonable or Natural.—This is merely modifying the "strict" construction view so as to interpret the words of the statute according to their reasonable and natural meaning, not straining their scope so as to give effect to an assumed intention of the legislators, on the one hand, nor employing them in their narrowest and most restricted sense, on the other. It is definitely formulated in this connection in but one case, *Bohn* v. *Brown,* 33 Mich. 257, but is in effect followed in most of the cases cited under the "strict construction" theory. Regarded by itself or as a modification of the narrowest statement of the "strict construction" theory it seems the only proper rule to adopt if the court is not to usurp purely legislative functions. And again we must revert to the same question with regard to the specific statute to be considered: "What is meant by the precise language employed in this statute?" The writer will not attempt to deal with each statute separately but will attempt briefly to state the law with regard to certain words and phrases commonly employed.

(a) "Liabilities"—This term includes tort claims against the corporation. *Lininger* v. *Botsford,* 163 Pac. 63; *Miller & Lux* v. *Kern County Land Co.,* 134 Cal. 586; *Wood* v. *Currey,* 57 Cal. 208.

(b) "Demands"—This term includes tort claims against the corporation. *Heacock* v. *Sherman,* supra.

(c) "Dues"—This term includes tort claims against the corporation, *Henley* v. *Meyers,* supra; *Flenniken* v. *Marshall,* supra; *Rider* v. *Fritchie,* supra. But see *Ward* v. *Joslin,* 100 Fed. 676, contra.

(d) "Debts contracted"—This term does not include tort claims against the corporation, even though reduced to judgment. *Heacock* v. *Sherman,* supra; *Bohn* v. *Brown,* supra; *Child* v. *Boston & Fairhaven Iron Wks.,* supra; *Rogers* v. *Stag Mining Co.,* supra; Contra, *Carver* v. *Braintree Mfg. Co.,* supra, a case which has been sufficiently discussed above.

(e) "Creditors"—This term does not include those holding claims against the corporation, founded on the tort of the corporation. *Doyle* v. *Kimball,* 23 Misc. 431; *Ward* v. *Joslin,* supra. Contra, *Henley* v. *Meyers,* supra.

In conclusion it may be stated that this summary is intended to be neither comprehensive nor conclusive. Again it must be emphasized that each statute must be considered separately with regard to the particular language used and must stand on its own foundation. Nevertheless the writer believes that a careful reading of the cases cited will materially aid in arriving at a sound interpretation of the statute under consideration. E. B. H.